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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1482

LAKESIDE MERCY HOSPITAL, INC.,

Petitioner,

vs.

INDIANA STATE BOARD OF HEALTH; STATE OF
INDIANA; CASPER W. WEINBERGER; SECRETARY
OF HEALTH, EDUCATION AND WELFARE; PARK-
VIEW MEMORIAL HOSPITAL, INC.; THE LUTHERAN
HOSPITAL, INC.; ST. JOSEPH'S HOSPITAL OF FORT
WAYNE, INC.

Respondents.

JOINT RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.

ROTHBERG, GALLMEYER,
FRUECHTENICHT & LOGAN,
Mezzanine Floor,
Fort Wayne, Indiana 46802,
Telephone: 422-9454,

JOHN H. LOGAN,
910 Lincoln Bank Tower,
Fort Wayne, Indiana 46802,
Telephone: 743-3392,

ICE, MILLER, DONADIO & RYAN,
Room 1000,
111 Monument Circle,
Indianapolis, Indiana 46204,
Telephone: 317/635-1213,

Attorneys for Respondents.

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**JOINT RESPONSE TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT.**

Respondents, Parkview Memorial Hospital, Inc., the Lutheran Hospital, Inc. and St. Joseph Hospital of Fort Wayne, Inc. jointly respond to and respectfully pray this Court deny the petition of Plaintiff-Appellant-Petitioner (Lakeside) for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Memorandum of Decision and Order of Judge Eschbach of the United States District Court for the Northern District

of Indiana, Fort Wayne Division, entered February 10, 1976, is reported at 421 Supp. 193, appears at pp. 1-23 of Petitioner's appendix. The unanimous opinion of the United States Circuit Court of Appeals for the Seventh Circuit dated December 30, 1976, Tom C. Clark, Luther M. Swygert and Walter J. Cummins, presiding, appears at pp. 26-29 of Petitioner's appendix. The Order denying the Petition for an en banc hearing dated January 27, 1977 appears at page 30 of Petitioner's appendix.

JURISDICTION.

This Court's jurisdiction is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Lakeside presented a variety of issues to the District Court and fourteen (14) separately stated "issues for review" to the Circuit Court of Appeals. Petitioner now states three new issues for review in support of its Petition for Writ of Certiorari. These Respondents do not agree that these issues are accurately or clearly stated and would restate the issues presented as follows:

I.

Whether the State Court orders are subject to collateral attack?

II.

Whether the ISBH agreement with the Secretary prevented the exercise of jurisdiction by the State Court under the Indiana Administrative Adjudication Act.

III.

Whether in the facts and circumstances of the present case, the Petitioner has been deprived of due process by the action of the ISBH in recommending to the Secretary that

the capital expenditures proposed to be incurred in the construction of the fourth hospital not be reimbursed to the Petitioner?

CONSTITUTION, STATUTE AND REGULATIONS.

Included in this Respondent's Appendix are the following:

Attachment 1—"Limitation on federal participation for capital expenditures". P. L. 92-603, 43 U. S. C. A. Sec. 1320a-1. (Section 1122)

Attachment 2—Subchapter I, Part 100, Subpart A—"Limitation on Federal Participation for Capital Expenditures" 42 C. F. R. Sec. 100.106.

Attachment 3—DPA Manual—Sec. VI—"Fair Hearing under Section 1122 and State Action."

Attachment 4—Indiana Administrative Adjudication Act I. C. 4-22-1-1 and 2, 14-19.

Attachment 5—Well Circuit Court—Judgments.

STATEMENT OF THE CASE.

The decisions of the District Court at pp. 2-9 of the appendix and of Court of Appeals at pp. 26-29 each contain an accurate Statement of the Case. The Petitioner's Statement of the Case at pp. 4-6 is redundant, confusing and inaccurate. To put these issues in the proper perspective it is important to point out several misstatements:

1. At p. 4, paragraph 1, Petitioner says: "This program (1122 Review) is designed to upgrade health care facilities throughout the nation by reimbursing through repayment provisions of Medicare/Medicade those persons who are about to make capital expenditures . . ."

This statement is inaccurate. The purpose of 1122 is to control "unnecessary capital expenditures". As is stated in Section (a) of the statute itself:

"The purpose of this section (Section 1122) is to assure that federal funds appropriated under Title V, XVIII, and XIX are not used to support unnecessary capital expenditures." 42 U. S. C. Section 1320a-1.

The purpose of the legislation is, therefore, to do precisely the opposite of what the Petitioner would have the Court do in the instant case—cause the Federal Government to participate in reimbursing for costs incurred in the construction of unnecessary and duplicative health care facilities.

2. At p. 4, paragraph 2 of the Petitioner's Statement of the Case, it is indicated the agency designated by the governor to make recommendations to the secretary under Section 1122 "becomes known as the Designated Planning Agency of the United States, Secretary of Health, Education and Welfare."

The characterization given the state agency as a "department of Health, Education and Welfare" is exactly the opposite of the facts. Section 1122(b) makes it clear that the Secretary's agreement is "with any state which is willing and able to do so." Throughout the statute and applicable regulations, particularly Regulation Section 100.105, the designated planning agency is referred to as the "state agency". The procedure prescribed to be followed in connection with agency review under Regulations Section 100.106 requires the establishment of procedures to be made "by the state". The determination is to be made pursuant to state procedures under Regulation Section 100.106(a). A fair hearing is required to be granted an applicant who receives an adverse determination by the state agency before a "fair hearing examiner" appointed by the governor of the state. Under Regulation Section 100.106(c) the proceedings are "kept in accordance with the requirements of applicable state law" Regulation Section 100.106(c)(2)(iii). Thereafter "judiciary review of such decision" under State Law may be obtained under Regulation Section 100.106(c)(4).

The DPA Manual provides for a "State Appeals Process" and states:

"The Section 1122 fair hearing process does not modify or replace any of these. DPA Manual Sec. VI(f) Appendix p. A14.

The purpose and intention of the Regulations and the Manual are to provide a procedure by which the "state agency" reviews and administers the programs established pursuant to the Health Service Act. The suggestion that the Indiana State Board of Health is a "department of the Health, Education and Welfare" is a gross distortion of the fact intended presumably to inaccurately lay a basis upon which the Petitioner subsequently argues improper interference by a State Court in the machinery of Federal Government.

3. At p. 5, paragraph 1, Petitioner Statement of the Case argues the regulations grant each petitioner "his own time clock."

Nowhere in the statute or in the regulations is any petitioner granted any kind of a time clock. This argumentative supposition that each applicant carries about a private time clock in his pocket, and that, among competing applications, the person whose time clock expires first has the most meritorious application, is simply not found in the Regulations. Such an argument may suit the Petitioners' purposes but it again distorts the purposes of the statute by requiring the state agency to recommend approval to the Secretary of the first application filed rather than on the most meritorious. Such an interpretation would cause the Federal Government to reimburse applicants for capital expenditures made by applicants who were most rapid afoot irrespective of whether the proposed expenditures were unnecessary or duplicative.

4. At p. 6, paragraph 1 the Petitioner's Statement of the Case Petitioner inaccurately states that the restraints of the Wells Circuit Court were not "judicial determinations".

The District Court's summary of the State Court proceedings appearing at pp. 13-15 of the appendix and the Circuit Court of Appeals summary of the State Court procedure appears at

pp. 26-29. Each are accurate. After a review of the State Court record both courts were convinced the determinations of the Wells Circuit Court were in fact judicial determinations. For the Petitioner now to premise its arguments on the factual assumption that the State Court Decree is not binding or was merely consensual and thus the State Board of Health was not bound by judicial determinations is simply and entirely inconsistent with the facts. Both the District Court opinion and the Circuit Court of Appeals Opinion which accurately summarize the facts reflects such court determinations and clearly "judicial". A review of the State Court proceedings clearly indicates that the ISBH had no alternative but to abide by the determination of the Wells Circuit Court.

The Decree of the State Court, pp. A21-26 of the Appendix, the record of the proceedings in the State Court as prepared by the Clerk of the Wells Circuit Court and filed in the District Court clearly and unquestionably demonstrate the restraints imposed upon the ISBH by the Decree of the Wells Circuit Court were judicial and not subject to collateral attack. The transcript shows the case was adversary, honestly contested, seriously tried and carefully briefed and determined. The transcript may be accurately summarized as follows:

October 4, 1974: Community Hospital filed a civil suit in the Allen Circuit Court, naming as Defendants the State of Indiana and its Board of Health. Under this complaint, Community asked for (1) judicial review of the decision of the ISBH adverse to Community's proposal to construct a fourth hospital in Fort Wayne, and (2) damages in the sum of One Hundred Thousand Dollars (\$100,000.00). At this point in time, Parkview, St. Joseph's, and Lutheran Hospitals had proposals to fill the same health care need pending before the Region 3 HPC. Lakeside also had a proposal to fill this health care need, which was then at the ISBH review level.

October 8, 1974: Community Hospital filed an amended complaint in Allen Circuit Court, which did not change the parties or relief sought but submitted certain exhibits.

October 9 and 10, 1974: Summonses were served upon the State of Indiana and the ISBH.

October 21, 1974: Community Hospital asked for and received an extension of time to file a transcript of the proceedings before the ISBH, wherein its proposal was disapproved.

October 23, 1974: Assistant Attorney General Schaefer appeared for the State of Indiana and the ISBH and asked for and received an extension of time to November 24, 1974, in which to answer the complaint.

November 12, 1974: Community Hospital filed its second amended verified petition for judicial review, damages and injunctive relief. By this amendment, the Region 3 HPC was added as a Defendant, and the Plaintiff sought as additional relief (1) a temporary restraining order to prevent the Region 3 HPC from acting to approve and forward to the ISBH the proposals of Parkview, St. Joseph's, and Lutheran Hospitals, and (2) a temporary restraining order against the ISBH.

November 12, 1974: Allen Circuit Court, after making extensive findings of fact, granted a temporary restraining order as Plaintiff sought and set the question of issuing an injunction pendente lite for November 20, 1974.

November 13, 1974: The Plaintiff's second amended petition and the restraining order were served on the Region 3 HPC and Assistant Attorney General Schaefer; and the summons was also served on the Region 3 HPC.

November 18 and 19, 1974: St. Joseph's and Parkview Hospitals petitioned to intervene in the Plaintiff's suit as Defendants on the ground their pending applications to fill the same bed needs were pending before HPC 3.

November 19, 1974: The State of Indiana and the ISBH both requested that the Allen Circuit Court continue the temporary restraining order in effect and set over for thirty (30) days the question of an injunction pendente lite.

November 20, 1974: The Allen Circuit Court granted the continuances requested by the State of Indiana and the ISBH and reset the hearing for December 20, 1974.

November 26, 1974: The State of Indiana and the ISBH filed for an automatic change of venue, which the Court

granted. The State of Indiana and the ISBH filed answers to the Plaintiff's second amended complaint.

December 9, 1974: All parties, by stipulation, selected Wells County as the county to which venue would be transferred. The Clerk of the Wells Circuit Court accepted the Docket Sheet of Allen Superior Court No. 74-575. The Stipulation of Venue and all the pleadings from the Allen Circuit Court. Parkview and St. Joseph's Hospitals requested the Court to modify the temporary restraining order of the Allen Circuit Court. This modification was granted. The restraining order, as modified, precluded Region 3 HPC from acting on the proposals of Parkview, St. Joseph's, and Lutheran Hospitals *and*, in addition, precluded the ISBH from acting on Lakeside's proposal (since the "clock" for Lakeside's proposal had again begun to run on December 5, 1974). Lakeside Mercy Hospital, by their counsel, acknowledges receipt of a copy of the temporary restraining order.

December 18, 1974: Wells Circuit Court, on its own motion, continued the temporary restraining order to December 31, 1974, and set that date for a hearing on the question of an injunction pendente lite.

December 31, 1974: Wells Circuit Court, with the consent of all parties, issued an injunction pendente lite, which continued the restraints against any action by the Region 3 HPC and the ISBH.

January 22, 1975: Lakeside submits to the Wells Circuit Court a question of whether the actions in connection with the temporary restraining order and temporary injunction are binding on Lakeside.

March 21, 1975: Community Hospital filed a motion for partial summary judgment. This was met by cross motions filed by the State of Indiana, the ISBH, and Parkview and St. Joseph's Hospitals.

May 27, 1975: Wells Circuit Court entered Findings and Order on Plaintiff's Motion for Summary Judgment and dissolved the injunction pendente lite insofar as it restrained action by the Region 3 HPC. However, the Court continued the injunction insofar as it restrained the ISBH from acting upon Lakeside's proposal until such time as the

ISBH could give simultaneous consideration to the proposals of St. Joseph's, Parkview, and Lutheran Hospitals (Appendix p. A21).

July 10, 1975: The ISBH, in compliance with the May 27, 1975, order of the Wells Circuit Court, considered all proposals, rejected Lakeside's proposal on the grounds that the proposed capital expenditure was not "economically feasible", would create "unreasonable increases" and would not "foster cost conditionment".

The Petitioner's suggestion that the restraints imposed upon the Indiana State Board of Health by the Wells Circuit Court were not "judicial", therefore, badly misleads the Court as to the true nature of the adjudication delaying the ISBH from proceeding with application review while competitive determinations were the subject of Court Review.

5. At p. 6, paragraph 2, Petitioner states the State Court determined it "had no subject matter or jurisdiction to review the Order of the ISBH since it is acting as an agency of the federal government".

This statement is inaccurate and grossly misleading.

The facts of the matter are that the ISBH, as the designated planning agency for Indiana, recommended to the Secretary under authority granted in Section 1122 and pursuant to Regulations Section 100.106(a) that the capital expenditures proposed to be incurred by Community in the construction of a fourth hospital be excluded from reimbursement because the State Plan did not permit a fourth hospital in the Fort Wayne area. Pursuant to Reg. Sec. 100.106(c) Community requested a "fair hearing with respect to the findings and recommendations of the designated planning agency." Thereupon, the governor of Indiana appointed a hearing examiner, the case was reheard, and findings of facts and conclusions of law were submitted by the hearing examiner recommending again a negative recommendation be made to the Secretary. Appendix p. A22.

Thereupon, Community perfected its appeal anticipated under Section 100.106(c)(4) which reads in part as follows:

" . . . Where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency."

The State Court did not find it lacked jurisdiction since the ISBH was "acting as an agency of the federal government". Rather, finding number two of the Wells Circuit Court entered on May 27, 1975 reads as follows:

"The Findings of Fact and Conclusions of Law of the Hearing Examiner revise the Findings of the Indiana State Board of Health (ISBH) and constitute a final order or determination made by an agency entitled to Judicial Review under the provisions of the Administrative Adjudication and Court Review Act. (I.C. 4-22-1, *et. seq.*)" Appendix p. A22.

The State Court found it had jurisdiction under I. C. Section 4-22-1 the Indiana Administrative Adjudication Act. That was the jurisdiction alleged in the complaint. Had the Petitioner objected to the Court Review on a jurisdiction basis it could have intervened and raised the question before the trial Court. In fact, the Petitioner did not. Not now until now before the Supreme Court has Petitioner suggested the Wells Court found it lacked jurisdiction.

A review of the State Court decree shows the Court found it had jurisdiction. The State Court proceedings follow precisely that prescribed by the Administrative Adjudication Act. The findings of the Wells Circuit Court follow the findings required by Section 18. They follow the statute almost verbatim:

"The decision of the Hearing Examiner revises the Findings and Determinations of ISBH but it does not reverse the decision of ISBH and constitutes a determination sub-

ject to review under Regulations Sec. 100.104(c) *et seq.* of the Regulations of the Secretary of Health, Education and Welfare.

"The Order, Decision and Determination made by the Hearing Examiner is not:

- (a) Arbitrary, capricious, or in abuse of discretion, or not otherwise in accordance with law, nor
- (b) contrary to any constitutional right, power, privilege or immunity, nor
- (c) in excess of statutory jurisdiction, authority or limitations, or short of statutory rights; nor
- (d) without observation of procedure required by law, nor
- (e) unsupported by substantial evidence." Appendix p. A24.

The "Stay" issued by the Allen and the Wells Circuit Court against the ISBH while the appeal was pending was necessary in order that the decision of the State Court was not rendered moot by an action of the State Agency. In fact, a stay by the Agency pending review is specifically anticipated in Section 17 of the Act:

" . . . The judge thereof may enter an order staying the order of determination pending final decision of the Court on said review, upon the filing of the bond conditioned upon the due prosecution of said proceedings for review and that the Petitioner will pay all costs and abide by the order or determination of the agency in question if it is not set aside."

Counsel for the Petitioner acknowledged receipt of a copy of the Court orders and was kept abreast of the litigation. No effort was made to attack the adjudications directly, but rather a collateral attack subsequently launched in the Federal District Court.

The Federal District Court did not conclude as suggested by Petitioner that the Wells Circuit Court lacked jurisdiction.

On the contrary, at p. 15 of the appendix at line 32, the District Court concluded "the Wells Circuit Court properly obtained jurisdiction on or prior to December 9, 1974."

The avowment by the Petitioner that the Hearing Examiner appointed by the governor and that the Wells Circuit lacked jurisdiction under the Indiana Adjudication Act has never before been presented and is totally unsupported by either the record itself or the determinations of the Federal District Court. The factual distortion is an obvious attempt to imprecisely lay the foundation for the collateral attack which was rejected by both the District Court and the Circuit Court of Appeals.

6. At p. 6, paragraphs 3 and 4, Petitioners say:

"the State Court issued a permanent injunction further prohibiting ISBH from acting specifically on Lakeside's application . . . (and) . . . Lakeside was entitled to have its application processed on an individual basis . . .".

In fact, no permanent injunction was issued. The final decree of the Wells Circuit Court reading as follows:

"The Motion to Dissolve the Preliminary Injunction filed by the Defendant St. Joseph Hospital of Fort Wayne, Inc., is granted and the preliminary injunction heretofore entered is dissolved except that the Indiana State Board of Health (ISBH) shall take no action on the pending application of Lakeside Mercy Hospital, Inc., until such time as the proposals of the three Fort Wayne hospitals to provide substantially the same health care facilities have been acted upon by Indiana Region 3, Comprehensive Health Planning Council and transmitted to the ISBH so as to permit simultaneous consideration with the application of Lakeside Mercy Hospital, Inc." (Appendix p. A21.)

Lakeside Mercy Hospital was granted a full hearing, permitted to introduce all of its evidence, and all the testimony it cared to introduce in support of its Application. Thereafter, on July 10, 1975, the ISBH, in compliance with the May 27, 1975 Order of the Wells Circuit Court, considering all the proposals and all

the evidence submitted by Lakeside, rejected Lakeside's proposal on the following grounds:

"7.) That the proposed capital expenditure is not economically feasible and cannot be accommodated in the patient charge structure of the health care facility without unreasonable increases.

8.) That the proposal will not foster cost containment or will not improve quality of care through improved efficiency and productivity, including promotion of cost effective factors such as ambulatory care, preventive health care services, home health care, and design and construction economics, or through increased competition between different health services delivery systems.

* * * * *

10.) That the Executive Board has considered that the § 314(b) agency deferred action on the Lakeside Mercy Hospital, Inc., proposal.¹

11.) That the proposal of Lakeside Mercy Hospital, Inc., does not come within the exception described in 42 CFR § 100.04(b)(2) since it has not demonstrated proof of capability to provide comprehensive health care services efficiently, effectively, and economically.

Lakeside refused to accept the recommendation of the ISBH. Rather than following the administrative review authorized under Section 1122(b)(3) and Regulations Section 100.106(c), the Petitioner asserted its claims in a collateral attack instituted in the Federal District Court. The attack was clearly collateral

1. Region 3, Comprehensive Health Planning Council established pursuant to Sec. 314(a)(b) of the Health Service Act, 42 U. S. C. A. § 246(a) in the fall of 1973 had recommended the Lakeside proposal not be endorsed (Record p. 29 Exhibit A, p. 6 l. 13). In a similar analysis, HPC 3 declined to take any favorable action on the Lakeside proposal (*Ibid.* l. 23) and recommended the bed need be met by expansion of the existing hospitals (*Ibid.* p. 7 l. 16). See the Position Paper of HPC 3 and the detailed economic study proposing the approval of the plan to expand existing hospitals (Record p. 29, Exhibit 2). The Lakeside application had also been acted unfavorably by the Review Division of the DPA (Record p. 29, p. 8 l. 2).

to both the administrative review procedures prescribed by the Secretary's Regulations and adjudications in the State Court.

• • •

The "Statement of the Case" which appears in the decision of the District and the Circuit Court of Appeals constitute an accurate synopsis of the facts and issues involved. The case is essentially a chronology of steps taken by the Petitioner trying to obtain reimbursement for capital expenditures for the construction of a new hospital which the planning agencies involved have determined both uneconomical and duplicative. The wide discrepancy between what this case is all about and what the Petitioner states the case is about lays the foundation for the Petitioner's arguments which are outside and unrelated to any issues presented to the District Court or the Circuit Court of Appeals.

REASONS FOR NOT GRANTING THE WRIT.

I.

Upon receiving the recommendation by the ISBH that the Secretary not reimburse Community for capital costs it proposed to incur in the construction of a fourth hospital, Community requested "a fair hearing with respect to such findings". The procedure prescribed to be followed by the ISBH with respect to such "fair hearing" was set out in Reg. Section 100.106(c). Upon an adverse determination by the "fair hearing examiner" Community elected to exercise rights granted it for judicial review under the provisions of the Indiana Administrative Adjudication Act (I. C. 4-22-1, et seq.).

The Indiana Administrative Adjudication Act is intended "to establish a uniform method of court review of all such administrative adjudication". Section 1. The Act provides for a required review any "administrative adjudication" "hearing or determination of any agency with issues or cases applicable to particular

persons" Section 2 thereby clearly granting to Community the opportunity for Judicial Review under the Act. The review provided for in the Act is clearly that anticipated as the "administrative remedy" . . . provided under State law "and not" prejudiced by the fact the proponent has requested and received a fair hearing under Section 1122. Reg. Sec. 100.106(a) (Appendix p. A9) and DPA Manual Sec. VI(f) p. A14 of Appendix.

To protect persons who might be effected, the Act provides in Sec. 17 for "a stay of the action of the agency pending decision by the Court." The injunctive relief issued first by the Allen Circuit on October 4, 1974, and ultimately culminating in the continuation of the temporary injunction on July 10, 1975, was fashioned as a method of avoiding irreparable harm by persons interested in or to be adversely effected by the appeal. Otherwise, the relief sought by Community on appeal would have been made moot by the affirmative action of the ISBH in approving the four competing applications to fill the same health care needs.

Petitioners now make three separate arguments as to why the ISBH was obliged to recommend to the Secretary that its application for the construction of a fourth hospital be recommended for reimbursement. All three arguments hinged upon the premise that the State Court Order is subject to collateral attack. Each argues, in one fashion or another, that this Court should declare that the ISBH has acted favorably upon the Petitioner's application for improvement of capital expenditures for the construction of a fourth hospital, even though

- (a) the ISBH acted negatively,
- (b) the Petitioner elected not to participate in the State Court proceedings and elected not to directly attack the Order of the State Court, and

- (c) The Petitioner failed to exercise the administrative remedies afforded it by Section 1122 and the related Regulations.²

In the introductory portion of the Petitioner's arguments at pp. 7 and 8, the Petitioner argues the Writ should be granted because "the Court below ignored the body of law developed by this Court" and because of "jurisdictional limitations imposed by established principles emitted from the supremacy clause." Since there is no citation as to what "body of law" the Petitioner is talking about nor any announcement of the "established principles" the Petitioner leaves nothing to answer from its introductory paragraph.

(A)

Petitioner states the first question as follows:

"Whether State Court has subject matter jurisdiction to restrain a Federal Agency . . . ?" (p. 9, paragraph 2, line 2)

There are two things wrong with the question as thus posed:

First, the decision being reviewed under the Administrative Adjudication Act and pursuant to which the State Court exercised jurisdiction was a decision of a State Agency—not the decision of a Federal Agency.

Second, jurisdiction to a review was specifically granted the Wells Circuit Court, not only under the Administrative Adjudication Act, but also under the pertinent Federal statutes, Section 1122, and Regulations Section 101.106(c)(4).

2. State Agency Review is required to be furnished in practically all Federal funded programs administered by the State. For example, the following State administered programs require "an opportunity for fair hearing before the State Agency". 42 U. S. C. A. Sec. 302 (State Old Age); Sec. 602(a)(4) (Aid to Needy Families); Sec. 1202(a)(4) (State Aid to the Blind); Sec. 1320(a)(1) (Limitation on Capital Expenditures); Sec. 1396a-(a)(3) (Medical Assistance Programs). State judicial review is routinely afforded.

The procedure followed by the State Court in the exercise of its jurisdiction was inconsistent neither with State law nor with the Secretary's Regulations. Section 1122(b)(3) specifically requires that the "governing body or advisory board" . . . "establish and maintain procedures pursuant to which a person proposing any such capital expenditure may appeal a recommendation by the designated planning agency and will be granted an opportunity for a fair hearing . . .". Regulation Section 100.106 (c) specifically indicates that:

"Any decision of a hearing officer, arrived at in accordance with this paragraph, shall, to the extent that it reverses or revises the findings or recommendations of the designated planning agency, supersede the findings and recommendations of the designated planning agency: *Provided*, That where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency."

The agreement between the Secretary and the State specifically provides that the appeal procedures shall be the appeal procedure specified by State law:

f. *State Appeals Processes.*

"Many States have appeals processes established for reviewing decisions on health projects, license issuance or revocation, certification for life safety factors, etc. The Section 1122 fair hearing process does not modify or replace any of these. The fact that a proponent has requested and received a fair hearing under Section 1122 does not prejudice the availability of such other judicial or administrative mechanisms as may exist for his use under State law or regulation." Appendix p. A14.

It is specifically provided, therefore, both by statute, by regulations and by the Secretary's agreement, that the procedure anticipated in the Administrative Adjudication Act is a State

procedure and would be controlled by State law. The State law, therefore, made no effort to "enforce" any "Federal Regulations" or exercise any jurisdiction of any Federal Agency. The Court simply exercised the jurisdiction granted it by both the Federal and State law to review the determination of the State Agency.

The Petitioner's real argument is that, while the State Court had jurisdiction, the *exercise* of that jurisdiction in the facts and the circumstances of the present case was improvident. That is, while the jurisdiction of the State Court is conceded by both the statute and the regulations, the fashion in which that jurisdiction was exercised was improper. That is to say, that the Federal Court should now substitute its discretion as to how the State Court should have exercised its jurisdiction in 1974 and 1975. That is to say, that the judgment of the Wells Circuit Court is subject to subsequent review in a collateral attack launched in the Federal Court. Such is clearly not the law. That this suit is in Federal Court does not alter applicable law. As the District Court appropriately found, the State Court decision was not subject to collateral attack to any greater extent in Federal District Court than would be permissible in the State Courts in Indiana.

Chicago & A. R. Ry. Co. v. Wiggins Ferry Co., 108 U. S. 18 (1882).

Burns v. Board of School Commissioners of Indianapolis, 437 F. 2d 1143 (7th Cir. 1971).

Bowdill v. Central Home Equipment Co., 216 F. 2d 156, *cert. den.* 358 U. S. 936, *reh. den.* 348 U. S. 977 (1954).

Commonwealth of Penn. v. Williams, 294 U. S. 176, (1934).

Harrah et al. v. State ex rel. Fellows, 36 N. E. 443, 446, 38 Ind. App. 395 (1905).

It is submitted, therefore, that the District Court properly saw and determined the issue with respect to collateral attack. It would have indeed been unwise and improper for the District Court to have interfered by collateral attack in the exercise of jurisdiction by the State Court. It would be doubly unwise and improvident for this Court to now do so.

(B)

The second question proposed by the Petitioner is hidden in the language of the first paragraph on page 12, line 9, which reads as follows:

"Such State Court action would be precluded . . . by the doctrine of sovereign immunity."

The difficulty with this question is again twofold:

First, the decision reviewed was the decision of a state agency and not that of the Federal Agency. The manual specifically provided that review would be the state agency in accordance with normal state procedure. The Federal Government was not a "party defendant" either in the Wells Circuit Court or before the United States District Court. Clearly the State of Indiana and its State Board of Health were the defendants in both cases. It was the decision of the Indiana State Board of Health which was being appealed from and it was Indiana and its Board of Health which, in each instance, was the defendant. Sovereign immunity of the United States is clearly outside the case. In fact has not been suggested at any stage of these proceedings until in this Petitioner's Petition for Writ of Certiorari.

Second, the review sought before the Wells Circuit Court and the relief prayed for there by plaintiff was relief specifically granted to the State Court under the Federal Statute and Federal Regulations. If sovereign immunity was somehow involved, as difficult at that might be to imagine, the Federal law specifically exempted the doctrine from applicability in the present case by the grant of authority to the State to review the action of its

own state agency. Judicial review takes place within the State Court. That places the exercise of jurisdiction in the State Court—not in the Federal Court. There can be no supremacy question in the present case because the Federal Government was not involved. There is no effort by the State to interfere with the action of any Federal officers. There was only the exercise of the State Court jurisdiction to a right of review granted it by Federal law itself. Both the statute and the pertinent regulations placed jurisdiction for judicial review within the authority of the State. It is clear, therefore, that where the State elected to exercise the jurisdiction granted it, it does not assert an improper supremacy over Federal law, but rather exercises the grant of a responsibility specifically designated and delegated to it by the statute. Not only does the statute delegate this responsibility to the State under Section 1122 in its Regulations, but the Regulations themselves require a "fair hearing" and specifically anticipate a judicial review similar to that which occurred in the present case. There is, therefore, no "supremacy" question. The only question involved is whether a Federal Court, acting at this late date, should collaterally review the determination of a State Court acting pursuant to a review procedure specifically granted it by both Federal and State law. The District Court properly decided it should not engage in collateral review of State Court Proceedings.

II.

The next question presented by the petitioner at p. 15, paragraph 2, is similar to the first questions and may be stated as follows:

"Whether the ISBH agreement with the Secretary prevented the exercise of jurisdiction by the State Court under the Indiana Administrative Adjudication Act."

This question differs from the earlier questions only in the particular as to whether or not the "agreement" deprived the State Court of jurisdiction.

The answer to the question is quite simple. The statute itself makes reference to the "state agency", the regulations prescribed a "fair hearing" be established by the "state agency" and the agreement of the Secretary specifically sets out that the exercise of the jurisdiction by the State Court shall "not prejudice the availability of such other judicial or administrative mechanisms as may exist of his (the applicant's) use under state law or regulation".

Contrary to what the Petitioner says at p. 16 line 4 of its Brief, neither *Edelman v. Jordan*, 472 F(2) 985 (7th Cir. 1972), reversed in part in 415 U. S. 651 (1974) nor *Rodriguez v. Swank*, 318 F. Supp. 289 (N. D. Ill. 1970) are "pertinent here". Involved in both cases was Section 404 of the Illinois Department of Public Aid Manual which provided that assistance payments for new applications may not be paid for a period prior to the month in which the application was approved. The District Courts in each of the two cases found the State regulations inconsistent and therefore superseded by the Federal regulation requiring "the receipt of sums within 30 days of application". 318 F. Supp. at p. 296 and 415 U. S. at p. 656. In neither case was there involved the grant of jurisdiction to a State Court. There is no administrative or judicial review in either case. Collateral attack of a State Court decree was not involved. It was simply a matter that an inconsistent State regulation had to give way to and be superseded by Federal standards pursuant to which the program was required to be administered.³

The cases cited, therefore, in no way bear on any of the issues involved below.

3. 403 U. S. 901 did not "affirm" the decision in *Rodriguez v. Swank* other than with respect to the right to amend the complaint and the right to proceed in forma pauperis.

Also, contrary to what the petitioner suggests at p. 16, this Court did not rule on the issue in *Edelman v. Jordan*. This Court granted jurisdiction in that case only "because of the apparent conflicts on the Sixth Amendment" (415 U. S. at p. 658) and not on any of the matters suggested as involved in this case.

III.

The petitioner's final question may be fairly stated as follows:

Whether in the facts and circumstances of the present case, the Petitioner has been deprived of due process by the action of the ISBH in recommending to the Secretary that the capital expenditures proposed to be incurred in the construction of the fourth hospital not be reimbursed to the Petitioner?

A.

The facts and circumstances of the present case make it clear that petitioner was given a full and complete hearing, an opportunity for a second hearing, and that most certainly "minimal constitutional protection of fair play and substantial justice, were clearly accorded Lakeside in connection with its application.

In 1973-74 five contesting applications were simultaneously pending before ISBH to fulfill the bed need anticipated for Fort Wayne by the State Plan. Community Hospital elected to submit its application for determination, asked for a fair hearing and then, as also anticipated in Regulation Section and the DPA Manual sought "judicial review of such decision." The Regulations specify that "... where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the Designated Planning Agency, shall to such extent supersede the findings and recommendations of the Designated Planning Agency."

Were the ISBH to act favorably on any of the other four competing applications while a fair hearing was in progress or an appeal being obtained, the relief sought by Community—that is, approval of the Community application—would be totally frustrated. If in the interim the ISBH granted an application for a competing right, the right to an appeal by the applicant or the right to judicial review would be totally frustrated because the bed need would have been absorbed by

a competing application. Therefore, out of fairness to the applicant who has sought a fair hearing or judicial review, the State Court determined the ISBH during the appeal had to stand by on competing applications.

B.

It is obvious that HEW interpreted the regulation in question to contain an implied exception to the "automatic approval after 60 days" rule in the event that DPA action upon applications before it is enjoined by a state court. Otherwise, it would not have accepted ISBH's ultimate recommendation that Lakeside's application be rejected. As that interpretation was made by the agency which promulgated the regulation in question, it should be deferred to by the Court, if it is not either inconsistent with the underlying statute or clearly erroneous. *Bowles v. Seminole Rock & Fan Co.*, 325 U. S. 410 (1945); *Udall v. Tallman*, 380 U. S. 1, *reh. den.* 380 U. S. 989 (1964); *Immigration & Naturalization Serv. v. Stanisic*, 395 U. S. 62, *reh. den.* 395 U. S. 487 (1969).

Obviously, the interpretation of the regulation adopted by ISBH, HEW and the District Court is not inconsistent with the legislation it implements. The entire point of 42 U. S. C. § 1320a-1 was to limit the capital expenditures for which reimbursement under Medicare/Medicaid was available. This purpose is clearly spelled out in the legislative history of the statute, a 1972 amendment to the Social Security Act.

Congress was concerned about the subsidization of construction of unnecessary hospital facilities by means of the capital depreciation formula for the determination of reimbursement for patient care under Medicare/Medicaid. Therefore, the statute in question was specifically enacted to monitor and limit unnecessary hospital construction. House Report (Ways and Means Committee) No. 92-231; 1973 U. S. C. C. A. A. N. 4989, 5004, 5065, 5288 (May 26, 1971); House Conference

Report No. 92-1605, 1972 U. S. C. C. A. A. N. 5380, 5383 (October 14, 1972).

In view of the underlying legislation, a literal interpretation of the regulation is absurd. If Lakeside's contention is correct, it means that no matter how many applications were submitted to a DPA enjoined from acting on them, they would *all* be automatically approved upon the expiration of their individual "time clocks". Thus the very proliferation of hospital facilities sought to be restricted would result from the application of a regulation supposedly designed to implement that legislative restriction. The literal interpretation of the regulation advocated by Lakeside is not merely inconsistent with the statute, it is diametrically opposed to the legislation which gave rise to the regulation.

It is equally clear that the interpretation of ISBH, HEW, and the District Court of the regulation being challenged is not "plainly erroneous."

General principles of statutory construction are applicable to the interpretation of administrative regulations. *Rucker v. Wabash R. R. Co.*, 518 F. 2d 146 (7th Cir. 1969). Thus, the regulation must be read as a whole in the context of the total legislation and the policies underlying it. *Philbrook v. Glodgett*, 421 U. S. 707 (1975); therefore, the regulation should not be read literally, for to do so would lead to an absurd result, one contrary to the purpose of the legislation as a whole. *Haggar Co. v. Helvering*, 308 U. S. 389 (1940); *Organized Migrants & Community Action, Inc. v. Brenner*, 520 F. 2d 1161 (D. C. Cir. 1975).

Application of these principles to the instant case leads to the inescapable conclusions that it is Lakeside's interpretation of the regulation that is clearly erroneous and that the interpretation of ISBH, HEW and the District Court must be approved.

If the regulation in issue *must* be construed strictly and literally, it is void and of no effect. An administrative regulation has the force of law if, and only if, it is not inconsistent

with or contrary to the purposes of the organic statute it is designed to effectuate. *Rosen v. United States*, 245 U. S. 467 (1918). As a literal interpretation of the regulation totally frustrates the legislative policy expressed in the underlying statute, it is simply void and of no effect. *Traders Nat'l Bank of Kansas City v. United States*, 148 F. Supp. 278 (W. D. Mo. 1956); *Smith v. Sutton*, 135 F. Supp. 805 (D. D. C. 1955).

The Secretary in its briefs before the District Court and the Circuit Court of Appeals and in the administration of the program has logically dealt with the appropriate interpretation of these Regulations. The interpretation grants all applicants for competing health facility needs a "reasonable period of time" within which to have their competing applications heard. The interpretation urged by Lakeside would require the Court to determine that, as among competing applicants the one that went first would lose its appeal right guaranteed by Section 1122. Such an interpretation of the Regulations as argued by the Petitioner is illogical, arbitrary and unreasonable. It was rejected by the Secretary, the Wells Circuit Court, ISBH and both Federal Courts and should not be given credence here.

C.

Petitioner's second due process argument fails for another reason. The fact that Lakeside was not a party to the lawsuit which gave rise to the injunction attacked by Petitioner is of no consequence. Assuming, *arguendo*, that Petitioner had a "right" to a determination on the merits of its application within 60 days after it was submitted, the injunction in question did not deprive it of that right without due process of law.

The results of litigation between two parties often has an effect upon third parties who are not directly involved in the lawsuit. However, it is neither the duty nor the responsibility of the litigating parties to protect the interests of non-participants. That responsibility rests with the one asserting an interest in the outcome of the dispute.

The Indiana Trial Rules specifically provide the mechanism for such a party to assert a claim in the outcome of a lawsuit between others. That mechanism is intervention. Trial Rule 24 provides that:

"Upon timely motion anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to a property, fund or *transaction*, which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect his interest in the property, fund or *transaction*, unless the applicant's interest is adequately represented by existing parties." (Emphasis added.)

In the instant case, Lakeside had actual notice and was fully apprised of all developments in the state court action. It had every right to intervene in that action to insure that any rights it had relating to its application before the ISBH were not adversely affected by a decision of the court. It chose not to intervene.

Furthermore, after being advised by ISBH that any further action on its application was stayed by a court order, Petitioner made no effort to utilize HEW appeals procedures to obtain a modification of ISBH's position.

Both intervention and administrative appeal were available to Petitioner to protect its claimed rights in the application processing procedure. Neither of these methods of recourse were exercised, not because their use was denied Petitioner, but because Petitioner chose not to press its claim in the manner afforded by law.

Petitioner's "rights" in this matter were the constitutionally guaranteed rights to a hearing and to an appeal. Those rights were available to it in this case at the time the complained-of injunction was entered and thereafter. That neither intervention or appeal occurred is attributable solely to Petitioner's inaction. "Due process", by definition, refers to procedure, not result. In this case, what Petitioner is dissatisfied with is result, not proce-

cedure. Due process of law was available to Petitioner. Having failed to invoke that process, it may not now complain of the result it obtained, and its Petition for a Writ of Certiorari must be denied.

D.

Petitioner was actually benefitted, not harmed, by the delay in the administrative process caused by the injunction entered by the Wells Circuit Court.

The State Plan in existence at the time of Petitioner's application to the ISBH permitted only three hospitals in Fort Wayne, Indiana. Thus it was not possible for the application to ISBH for approval of construction of a fourth hospital to have been lawfully approved. Action at that time, by ISBH, could have resulted only in rejection of the application. Therefore, it was to Lakeside's advantage for a decision on its application to be delayed until such time as the existing State Plan could be amended—as it subsequently was. As the record indicates, ISBH after the amendment considered Petitioner's application on the merits, subsequent to amendment of the State Plan despite the fact that it was submitted (and would have been rejected, absent the injunction) at a time when it could not possibly have been approved.

E.

It should be noted Lakeside had an opportunity to be heard. It could, in fact, have been heard at any time within sixty days of the time of filing its application. It had an opportunity for a simultaneous hearing with Community. Any of these opportunities afforded Lakeside "a reasonable time within which to be heard" under Section 1122. It elected not to avail itself of any of these opportunities and acquiesced in the action by Community Hospital in advancing its application first. Community therefore had, under the Regulations, a right to be heard and to pursue a fair hearing and a judicial review afforded

under Section 100.106(c)(4). It is only a fair interpretation of the Regulations that when Community permitted the competing application for the same health care facility to proceed, that it waived its right to object to Community exhausting the remedies afforded it under the Regulations. A "reasonable time within which to be heard" with respect to the Lakeside application was, therefore, after Community had exhausted its remedies under Regulations Section 100.106(c)(4) when the "final decision of the Reviewing Court", the judgment of the Wells Circuit Court in this case entered on May 27, 1975, confirmed the "findings and recommendations of the Designated Planning Agency" with respect to Community then Lakeside again was entitled to be heard on its competing application within a reasonable time. Any other interpretation of the Regulations permits the intended purposes of Section 1122 to be frustrated by permitting the ISBH to permit the construction of one health care facility while permitting the "Reviewing Court" to simultaneously approve the construction of an identical health care facility.

The Court should note Lakeside was in no better position than the other three applicants with respect to the time clock issue. If Lakeside's application had been approved by "lapse of time" so had the competing applications of all three of the hospitals each of whom then had pending applications to absorb the entire bed requirement. In the event Lakeside's application and those of the three existing hospitals were likewise approved by lapse of time, and approximately 500 hospital beds have been authorized for construction in Fort Wayne in 1978 by reason of the approval of all applications then pending.

It is submitted, therefore, in the facts and circumstances of the present case, competing applicants are given a reasonable period of time within which to have a hearing under Section 1122 when steps are taken by the ISBH to hear competing applications simultaneously. When one of the competing applicants asks for delay it is not unreasonable that he be required to delay

until the initial applicant has exhausted the remedies afforded him by the Secretary under Regulations.

On July 9, 1975, the hearing on all competing proposals was taken under consideration and a full hearing had. Lakeside was present by its officers, but declined to respond to questions by the ISBH and submit additional requested data solicited by the ISBH. Following this full and fair hearing with respect to all of the completing applications, the ISBH made the following factual determination supporting its decision to recommend to the Secretary that the capital improvements proposed by Lakeside not be reimbursed:

7.) That the proposed capital expenditure is not economically feasible and cannot be accommodated in the patient charge structure of the health care facility without unreasonable increases.

8.) That the proposal will not foster cost containment or will not improve quality of care through improved efficiency and productivity, including promotion of cost effective factors such as ambulatory care, preventive health care services, home health care, and design and construction economics, or through increased competition between different health services delivery systems.

* * * * *

Lakeside chose not to appeal from this administrative adjudication. It filed no objections to the findings of the ISBH, requested no "fair hearing" be accorded under regulations, and did not effect a "judicial review" of the administrative adjudication by the State Board.

The reason that administrative review was abandoned is obvious—Lakeside had no substantial expectation that either the fair hearing officer or the State Court could find that the capital expenditures proposed by Lakeside were "economically feasible" or would "foster cost containment". Lakeside tried, therefore, to win approval of its application without subjecting it to a complete review. The method selected was by collateral attack in the Federal Court. Lakeside has been unsuccessful in

both the District Court and the Circuit Court of Appeals. In the sense of all justice it should be unsuccessful here. Not only has minimal constitutional protection of fair play and substantial justice been afforded Lakeside in the facts and circumstances of the present case, but they have been given one full hearing and an opportunity for a second. They elected not to complete the final hearing because they knew they could not win. Should the Supreme Court now rule in Lakeside's favor unnecessary and completely duplicative health care facilities would be imposed upon Fort Wayne for which both the people of Fort Wayne and the public at large would be required to reimburse the petitioner. Such a result would clearly not be in the interest of "fair play and substantial justice" and would be a complete frustration of the efforts of Congress to assure:

" . . . that federal funds appropriated under Title V, XVIII, and XIX are not used to support unnecessary capital expenditures." 42 U.S.C. Section 1320a-1

F.

It is inappropriate for this Court to even consider the merits of Petitioner's arguments in support of its Petition for a Writ of Certiorari. The relief sought by Petitioner should be denied for the additional reason that Petitioner has totally failed to exhaust its administrative remedies prior to initiating this action in the District Court.

It is well-established that a party claiming to be aggrieved by an action of an administrative agency may not seek redress for the alleged wrong from the courts prior to exhausting its administrative remedies. *See, e.g., Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). Although there are some limited exceptions to this rule, none are applicable to the facts in the case at bar. Petitioner itself has not even suggested the existence of any extraordinary facts which would bar application of this doctrine.

In this case, the ultimate relief sought by Lakeside is the approval of its application for approval of capital expenditures pursuant to the provisions of 42 U. S. C. § 1320a-1. An applicant dissatisfied with a DPA's initial decision on its application can, within 30 days of receipt of notice of the decision, request a hearing on its application. 42 U. S. C. § 1320a-1(f) provides that a final determination by the Secretary of HEW upon an application may be reconsidered at the request of an applicant at any time within six months of that determination.

Petitioner therefore was provided by statute with three separate opportunities to obtain from an administrative agency the relief sought by its lawsuit. However, Petitioner filed this lawsuit even before it had received an initial determination on the merits as to its application. Thus, not only did Lakeside not exhaust its administrative remedies before filing suit, it did not even await completion of the *first stage* of the administrative process. In fact, it refused to even participate in the hearing on its application held upon ISBH's own motion.

Therefore, for the additional reason that Lakeside has failed to exhaust its administrative remedies with respect to the issues that it raises with this Court, the decision of the Court of Appeals should be affirmed and the Petition for a Writ of Certiorari should be denied.

CONCLUSION.

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SOL ROTHBERG

Mezzanine Floor
Indian Bank Building
Fort Wayne, Indiana 46802

JOHN H. LOGAN

910 Lincoln Bank Tower
Fort Wayne, Indiana 46802

GEOFFREY SEGAR

Room 1000,
111 Monument Circle
Indianapolis, Indiana 46204

Attorneys for the Respondents

APPENDIX.**ATTACHMENT 1.****Limitation on Federal Participation for Capital Expenditures.**

Sec. 1122. (a) The purpose of this section is to assure that Federal funds appropriate under the title V, XVIII, and XIX are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any of such titles and that, to the extent possible, reimbursement under such titles shall support planning activities with respect to health services and facilities in the various States.

(b) The Secretary, after consultation with the Governor (or other chief executive officer) and with appropriate local public officials, shall make an agreement with any State which is able and willing to do so under which a designated planning agency (which shall be an agency described in clause (ii) of subsection (d)(1)(B) that has a governing body or advisory board at least half of whose members represent consumer interests) will—

(1) make, and submit to the Secretary together with such supporting materials as he may find necessary, findings and recommendations with respect to capital expenditures proposed by or on behalf of any health care facility or health maintenance organization in such State within the field of its responsibilities.

(2) receive from other agencies described in clause (ii) of subsection (d)(1)(B), and submit to the Secretary together with such supporting material as he may find necessary, the findings and recommendations of such other agencies with respect to capital expenditures proposed by or on behalf of health care facilities or health maintenance organizations in such State within the fields of their respective responsibilities, and

(3) establish and maintain procedures pursuant to which a person proposing any such capital expenditure may appeal a recommendation by the designated agency and will be granted an opportunity for a fair hearing by such agency or person other than the designated agency as the Governor (or other chief executive officer) may designate to hold such hearings,

whenever and to the extent that the findings of such designated agency or any such other agency indicate that any such expenditure is not consistent with the standards, criteria, or plans developed pursuant to the Public Health Service Act (or the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963) to meet the need for adequate health care facilities in the area covered by the plan or plans so developed.

(c) The Secretary shall pay any such State from the Federal Hospital Insurance Trust Fund, in advance or by way of reimbursement as may be provided in the agreement with it (and may make adjustments in such payments on account of overpayments or underpayments previously made), for the reasonable cost of performing the functions specified in subsection (b).

(d)(1) Except as provided in paragraph (2), if the Secretary determines that—

(A) neither the planning agency designated in the agreement described in subsection (b) nor an agency described in clause (ii) of subparagraph (B) of this paragraph had been given notice of any proposed capital expenditure (in accordance with such procedure or in such detail as may be required by such agency) at least 60 days prior to obligation for such expenditure; or

(B)(i) the planning agency so designated or an agency so described had received such timely notice of the intention to make such capital expenditure and had, within a reasonable period after receiving such notice and prior to obligation for such expenditure, notified the person proposing such expend-

iture would not be in conformity with the standards, criteria, or plans developed by such agency or any other agency described in clause (ii) for adequate health care facilities in such State or in the area for which such other agency has responsibility, and

(ii) the planning agency so designated had, prior to submitting to the Secretary the findings referred to in subsection (b)—

(I) consulted with, and taken into consideration the findings and recommendations of, the State planning agencies established pursuant to section 314(a) and 604(a) of the Public Health Service Act (to the extent that either such agency is not the agency so designated) as well as the public or nonprofit private agency or organization responsible for the comprehensive regional, metropolitan area, or other local area plan or plans referred to in section 314(b) of the Public Health Service Act and covering the area in which the health care facility or health maintenance organization proposing such capital expenditure is located (where such agency is not the agency designated in the agreement), or, if there is no such agency, such other public or nonprofit private agency or organization (if any) as performs, as determined in accordance with criteria included in regulations, similar functions, and

(II) granted to the person proposing such capital expenditure an opportunity for a fair hearing with respect to such findings;

then, for such period as he finds necessary in any case to effectuate the purpose of this section, he shall, in determining the Federal payments to be made under titles, V, XVIII, and XIX with respect to services furnished in the health care facility for which such capital expenditure is made, not include any amount which is attributable to depreciation, interest on borrowed funds, a return on equity capital (in the case of proprietary facilities), or other expenses related to such capital expenditure. With respect to any organization which is reimbursed on a per capita or a fixed fee or negotiated rate basis, in determining the Federal payments to be made under titles V, XVIII, and XIX, the Sec-

retary shall exclude an amount which in his judgment is a reasonable equivalent to the amount which would otherwise be excluded under this subsection if payment were to be made on other than a per capita or a fixed fee or negotiated rate basis.

(2) If the Secretary, after submitting the matters involved to the advisory council established or designated under subsection (i), determines that an exclusion of expenses related to any capital expenditure of any health care facility or health maintenance organization would discourage the operation or expansion of such facility or organization, or of any facility of such organization, which has demonstrated to his satisfaction proof of capability to provide comprehensive health care services (including institutional services) efficiently, effectively, and economically, or would otherwise be inconsistent with the effective organization and delivery of health services or the effective administration of title V, XVIII, or XIX, he shall not exclude such expenses pursuant to paragraph (1).

(e) Where a person obtains under lease or comparable arrangement any facility or part thereof, or equipment for a facility, which would have been subject to an exclusion under subsection (d) if the person had acquired it by purchase, the Secretary shall (1) in computing such person's rental expense in determining the Federal payments to be made under titles V, XVIII, and XIX with respect to services furnished in such facility, deduct the amount which in his judgment is a reasonable equivalent of the amount that would have been excluded if the person had acquired such facility or such equipment by purchase, and (2) in computing such person's return on equity capital deduct any amount deposited under the terms of the lease or comparable arrangement.

(f) Any person dissatisfied with a determination by the Secretary under this section may within six months following notification of such determination request the Secretary to reconsider such determination. A determination by the Secretary under this section shall not be subject to administrative or judicial review.

(g) For the purpose of this section, a "capital expenditure" is an expenditure which, under generally accepted accounting principles, is not properly chargeable as an expense of operation and maintenance and which (1) exceeds \$100,000, (2) changes the bed capacity of the facility with respect to which such expenditure is made, or (3) substantially changes the services of the facility with respect to which such expenditure is made. For purposes of clause (1) of the preceding sentence, the cost of the studies, surveys, designs, plans, working drawings, specifications, and other activities essential to the acquisition, improvement, expansion, or replacement of the plant and equipment with respect to which such expenditure is made shall be included in determining whether such expenditure exceeds \$100,000.

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ATTACHMENT 2.

PART 100—COST CONTAINMENT AND QUALITY CONTROL.

Subpart A—Limitation on Federal Participation for Capital Expenditures.

§ 100.101 Applicability.

The provisions of this subpart are applicable to agreements entered into by the Secretary with the various States pursuant to section 1122 of the Social Security Act (42 U. S. C. Chap. 7), and to determinations made by the Secretary thereunder, for the purpose of assuring that Federal funds appropriated under titles V, XVIII, and XIX of the Social Security Act are not used to support unnecessary capital expenditures made by or on behalf of health care facilities or health maintenance organizations which are reimbursed under any of such titles and that, to the extent possible, reimbursement under such titles shall support planning activities with respect to health services and facilities in the various States.

* * * * *

§ 100.106 Agreement; procedures for agency review.

(a) The Agreement shall provide for the following notification and review procedures:

(1) The designated planning agency shall establish, maintain, and disseminate to all health care facilities and health maintenance organizations within the State procedures under which timely written notice of the intention to make a capital expenditure subject to this subpart is required to be given (i) to the designated planning agency, in which case such agency shall distribute copies of such notice to those other agencies described in § 100.105 whose respective fields of responsibility cover the proposed expenditure, or (ii) simultaneously to the designated

planning agency and to those other agencies described in § 100.105 whose respective fields of responsibility cover the proposed expenditure. Such notice shall set forth the date on which the obligation is expected to be incurred, and must be received by the designated planning agency not less than 60 days prior to such date.

(2) Such notice shall be submitted in such form and manner and shall contain such information as may be required by the designated planning agency to meet the needs of all the agencies whose respective fields of responsibility cover the proposed expenditure. The designated planning agency shall promptly publicize its receipt of such notice through local newspapers and public information channels.

(3) If the notice under this paragraph is found by the designated planning agency to be incomplete, such agency shall notify the person proposing the capital expenditure within 15 days of its receipt of such incomplete notice, advising such person of the additional information required. Where such timely notification of incompleteness is provided, the period within which the agency is required to notify the person proposing such expenditure that such expenditure is not approved, as required by section 1122(d)(1)(B)(i) of the Act and paragraph (a)(4) of this section, shall run from the date of receipt by the agency of a notice containing additional information.

(4) Except as provided in paragraph (a)(3) of this section, the designated planning agency shall, prior to the date set out in the written notice of intention submitted pursuant to paragraph (a)(1) of this section as the expected date for the obligation of the proposed expenditure (but, subject to the provisions of paragraph (a)(3) of this section in no event later than 90 days after the receipt of such notice unless the person proposing the capital expenditures agrees to a longer period), provided written notification to the person proposing such capital expenditure (i) that such capital expenditure has been determined by such agency to be in conformity with the standards, criteria and plans described in § 100.104(a)(2); or (ii)

that such agency has elected not to review the proposed capital expenditure (which election shall be equivalent to a determination by such agency that such expenditure is in conformity with such standards, criteria and plans), in which event the designated planning agency shall notify the Secretary of its reasons for electing not to review the proposed capital expenditure; or (iii) that such agency after having consulted with, and taken into consideration the findings and recommendations of, the other agencies described in § 100.105 (to the extent that such proposed capital expenditure is within the respective fields of responsibility of such other agencies), has determined that the proposed capital expenditure would not be in conformity with the standards, criteria, or plans described in § 100.104(a)(2). The failure of the designated planning agency to provide any such notification within the time limitations set forth above shall have the effect of a determination described in paragraph (a)(4)(i) of this section. The notification described in paragraph (a)(4)(iii) of this section shall be accompanied by a statement of the designated planning agency's proposed recommendation to the Secretary and the reasons therefor, a summary of the findings and recommendations of the other agencies with which such agency has consulted pursuant to paragraph (a)(4)(iii) of this section and shall provide an opportunity for a fair hearing with respect to the findings and recommendations of the designated planning agency at the request of the person proposing such capital expenditure.

(5) Copies of the findings and recommendations of the designated planning agency shall also be sent to the other agencies consulted, and shall be publicized through local newspapers and public information channels.

(b) Any person proposing a capital expenditure may withdraw his preciously filed notice or proposed capital expenditure, without prejudice, by filing simultaneous written notification of such withdrawal with these agencies to which he gave notification pursuant to paragraph (a)(1) of this section, at any time prior

to his receipt of notice pursuant to paragraph (a)(4)(i), (ii), or (iii) of this section.

(c) In addition to any other hearing which may be provided by an agency described in § 100.105 in connection with the review of a proposed capital expenditure under this subpart, the Agreement shall provide that the designated planning agency will grant to a person proposing a capital expenditure an opportunity for a fair hearing with respect to the findings and recommendations of the designated planning agency, and will establish and maintain procedures for such appeal. Such procedures shall include the following:

(1) The request for a hearing must be made in writing, to the designated planning agency, within 30 days after the date on which the person proposing the capital expenditure receives notice of an adverse finding or recommendation of the designated planning agency.

(2) The hearing shall be commenced within 30 days after receipt of the request described in paragraph (c)(1) of this section (or later, at the option of the person requesting the hearing), and shall be conducted in accordance with the applicable requirements of State law and by such agency or person, other than the designated planning agency, as the Governor (or other chief executive officer of the State) may designate for that purpose: *Provided*, That no agency which or person who has taken part in any prior consideration of or action upon the proposed capital expenditure may conduct such hearing.

(i) The hearing shall be open to the public and shall be publicized through local newspapers and public information channels.

(ii) The person proposing the capital expenditure, the other agencies described in § 100.105, and other interested parties, including representatives of consumers of health services, shall be permitted to give testimony and present arguments at the hearing.

(iii) A record of the proceedings shall be kept in accordance with the requirements of applicable State law and copies of such record together with copies of all documents received in evidence, shall be available to the public for inspection and copying: *Provided*, That any person who requests copies of such material may be required to bear the costs thereof.

(3) As soon as practicable, but not more than 45 days after the conclusion of a hearing, the hearing officer shall notify the person who requested the hearing, the designated planning agency, the other agencies described in § 100.105 who participated in the hearing, and other interested parties at the discretion of the hearing officer, of his decision and the reasons therefor. Such decision shall be publicized through local newspapers and public information channels. In the event that the hearing officer fails to provide notice as required above within 45 days after the conclusion of a hearing, such failure to provide notice shall have the effect of a finding that the proposed capital expenditure is in conformity with the standards, criteria, and plans described in § 100.104(a)(2).

(4) Any decision of a hearing officer, arrived at in accordance with this paragraph, shall, to the extent that it reverses or revises the findings or recommendations of the designated planning agency, supersede the findings and recommendations of the designated planning agency: *Provided*, That where judicial review of such decision is obtained, the final decision of the reviewing court, to the extent that it modifies the findings and recommendations of the designated planning agency, shall to such extent supersede the findings and recommendations of the designated planning agency.

(5) To the extent that any decision of a hearing officer pursuant to this paragraph requires that the designated planning agency take further action, such action shall be completed by such date as the hearing officer may specify. Failure by the designated planning agency to complete such action by such date shall have the effect of a finding that the proposed capital expenditure is in conformity with the standards, criteria, and plans described in § 100.104(a)(2).

ATTACHMENT 3.

DPA MANUAL.

GUIDANCE AND PROCEDURES FOR DESIGNATED PLANNING AGENCIES IN ADMINISTERING SECTION 1122 OF THE SOCIAL SECURITY ACT.

* * *

March, 1974

* * *

VI. FAIR HEARING UNDER SECTION 1122 AND STATE ACTION.

a. *Fair Hearing at State Level Under Section 1122.*

The DPA's notice to a proponent on whose proposal it has made a negative finding and recommendation must include the information that he has the right to a fair hearing concerning the basic facts encompassed in the initial application review. Individual notifications are necessary, and should be sent to the proponent no more than 5 days after a negative finding is arrived at by the DPA. If the proponent wishes to appeal, he must respond to the DPA *in writing* not more than 30 days after the date of such notification, requesting a fair hearing on his case, or he forfeits his right to a fair hearing. The hearing must begin within 30 days after receipt of the request (or later, at the option of the proponent). If a fair hearing is requested the DPA should issue a press release describing the proposal and telling the time and place of the hearing.

b. *Substance of Fair Hearing Under Section 1122.*

The primary purpose of the fair hearing process is for the hearing officer to determine whether the proposed expenditure

is consistent with the standards, criteria, and plans specified in the statute. The correctness, adequacy, or appropriateness of the standards, criteria, and plans against which the proposed expenditure was measured are *not* matters for consideration at the hearing. The question of the DPA's adherence to its procedures, as outlined in the Regulations and the Agreement, may be considered. The applicant may also introduce evidence and argument on the issue of whether the exclusion of expenses related to the proposed expenditure would discourage the operation or expansion of the facility or organization, or would otherwise be inconsistent with the effective organization and delivery of health services or the effective administration of Titles V, XVIII, and XIX.

The question of whether a proposed expenditure is subject to review under Section 1122 will not, in light of the appeal to DHEW available to the proponent (see paragraph *d*, chapter V), be a question in the fair hearing.

The hearing officer may submit his own finding as to whether the proposed expenditure is consistent with the applicable standards, criteria, and plans, and in the case of a negative finding, his recommendation as to whether or not the Secretary should exclude from reimbursement expenses related to the proposed expenditure. The hearing officer may direct that the DPA take further action on the proposed expenditure. The hearing officer may also reach such supplementary conclusion (e.g. on the question of adherence to procedural requirements) and submit such further recommendations as he deems appropriate.

c. Hearing Officer.

The designation of hearing officers is made by the Governor, not the DPA. In most States it will be done through the State agency which usually selects hearing examiners. A hearing officer must have no official assignment or tie to the 314(a), 604(a) or other State agency playing a direct role in the review. He may be designated by the Governor on a periodic basis, specifically

to serve at Section 1122 fair hearings, or he may be selected by lot, subject to his availability, from a roster of qualified hearing officers assembled in accordance with State requirements governing the selection of impartial examiners to assist the State in other areas.

d. Hearing Record.

The official record of hearings is to be kept in accordance with the requirements of applicable State law. The State will furnish copies of the record to the person requesting the hearing, but in furnishing copies to others may require them to pay the cost of them. The official hearing file will be retained at State level, in such form as the State specifies, with a summary of the determination by the hearing officer forwarded to the regional office (See Flow Chart, Appendix 4).

e. Hearing Decisions and Notifications.

The hearing officer must reach a decision and give notice of it not more than 45 days after the conclusion of the hearing; failure to do so has the effect of a positive finding. The hearing officer will notify the proponent who requested the hearing, the DPA and other health planning agencies, and such other parties as he feels have an immediate interest. The notice will include the decision, the reason for it, and, if appropriate, the corrective steps needed.

To the extent that the hearing officer's decision requires further action by the DPA, such action must be completed by the date he specifies. Failure to complete the action by the date specified has the effect of a positive finding.

Receipt of this notice will indicate the next steps for the DPA. One of these will be notifying the general public through the procedure described in paragraph *h*, of Chapter V, page 12, above.

f. State Appeals Processes.

Many States have appeals processes established for reviewing decisions on health projects, license issuance or revocation, certification for life safety factors, etc. The Section 1122 fair hearing process does not modify or replace any of these. The fact that a proponent has requested and received a fair hearing under Section 1122 does not prejudice the availability of such other judicial or administrative mechanisms as may exist for his use under State law or regulation.

ATTACHMENT 4.

4-22-1-1 Purpose

Sec. 1. It is the intent to establish a uniform method of administrative adjudication by all agencies of the state of Indiana, to provide for due notice and an opportunity to be heard and present evidence before such agency and to establish a uniform method of court review of all such administrative adjudication.

4-22-1-2 Definitions

Sec. 2. The word "agency" whenever used in this act shall mean and include any officer, board, commission, department, division, bureau or committee of the state of Indiana other than courts, the governor, military officers or military boards of the state, state colleges or universities supported in whole or part by state funds, benevolent, reformatory or penal institutions, the industrial board, state board of tax commissioners and the public service commission of Indiana: Provided, however, That on and after the first day of April 1951, the above entitled act shall not apply to, control nor affect the Indiana department of state revenue or any division, department, or agency thereunder. With respect to any matters involving taxpayers' objections either to the assessment of tax, and/or penalties and interest thereon, or the denial of a claim for refund of the same, which may be or may have been imposed by any act under the administrative jurisdiction of the said Indiana department of state revenue in which matters of adjudication under the provisions of this act has been requested but in which no final determination has been made by the adjudicating agency, the taxpayer may, on or before May 1, 1951, file a petition with the circuit or superior court of the county in which he resides or in the circuit or superior court

of Marion County for the transfer thereto of any such matter, together with his complaint and shall serve summons upon the department as required by law. Any such court with which such petition for transfer and complaint is filed is hereby vested with jurisdiction thereof and upon the filing of the petition and complaint shall require an answer thereto by the adverse party. Upon the closing of the issues, the court shall set the matter for hearing and conduct a hearing on said petition and complaint, take testimony, examine the evidence in the matter de novo, determine whether the action of the department complained of was erroneous, and make an appropriate order or decree which shall be subject to appeal in the same manner as in other civil cases. If such petition for transfer is not filed on or before the first day of May, 1951, all hearing procedure in matters theretofore pending adjudication under the provisions of the above entitled act shall be considered nullified and thereafter such hearing procedure shall be governed by the provisions of the particular tax act involved as to protests, objections, hearings, findings, payment of tax or license fees and suit for refund thereof.

The provisions of the above entitled act having been supplementary to the procedures in the revenue acts administered by the Indiana department of state revenue and its component divisions, it is hereby expressly provided that the procedures specified in said revenue acts shall continue to remain in full force and effect.

The word "person" whenever used in this act shall mean and include any person, firm, association, partnership or corporation. It shall also include municipalities and all political subdivisions of government against which any agency may make an order or determination.

"Administrative adjudication" means the administrative investigation, hearing and determination of any agency of issues or cases applicable to particular persons, excluding, however, the adoption of rules and regulations; the issuance of warrants or

jeopardy warrants for the collection of taxes or employment security contributions; the payment of benefits by the employment security division; the review by the state board of tax commissioners of budgets, appropriations, tax levies and bond issues; determination of eligibility and need for public assistance under the welfare laws; mathematical calculations for the purpose of classification of townships by the state board of accounts; orders and prescribed procedure relating to the administration or supervision of the administration of public assistance under the welfare laws; determinations which affect only other agencies; determinations by the Indiana alcoholic beverage commission other than determinations to which this act is specifically made applicable by any other law; and the dismissal or discharge of an officer or employee by a superior officer, but including hearings on discharge or dismissal of an officer or employee for cause where the law authorizes or directs such hearing.

* * * * *

4-22-1-14 Petition for review

Sec. 14. Any party or person aggrieved by an order or determination made by any such agency shall be entitled to a judicial review thereof in accordance with the provisions of this act. Such review may be had by filing with the circuit or superior court of the county in which such person resides, or in any county in which such order or determination is to be carried out or enforced, a verified petition setting out such order, decision or determination so made by said agency, and alleging specifically wherein said order, decision or determination is:

- (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or
- (2) Contrary to constitutional right, power, privilege or immunity; or
- (3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or

- (4) Without observance of procedure required by law; or
- (5) Unsupported by substantial evidence.

Said petition for review shall be filed within fifteen (15) days after receipt of notice that such order, decision or determination is made by any such agency. Notice shall be given in the manner prescribed by section 6 of this act. Unless a proceeding for review is commenced by so filing such petition within fifteen (15) days any and all rights of judicial review and all rights of recourse to the courts shall terminate.

* * * *

4-22-1-16 Judicial review

Sec. 16. On the filing of a verified petition for such judicial review, said cause shall be docketed by the clerk of said court in the name of the petitioner or petitioners against such agency and all other parties to the petition. The issues shall be deemed closed by denial of all matters at issue without the necessity of filing any further pleadings. Changes of venue from the judge and from the county shall be granted either party under the law now governing, or which may hereafter govern changes of venue in civil causes.

4-22-1-17 Petition for judicial review; stay of action pending review

Sec. 17. Where a petition for judicial review is filed as provided in this act in a matter other than an assessment or determination of tax due or claimed to be due the state, and where the law concerning the agency whose order or determination is being reviewed does not preclude a stay of such order by the court, the person seeking such review may seek such action by filing a verified petition for an order of court staying the action of the agency pending decision by the court. If the court in which said petition is filed, or the judge thereof in vacation, finds that said petition for review and said petition for a stay

order show a reasonable probability that the order of determination appealed from is invalid or illegal, said court or the judge thereof may enter an order staying the order or determination pending final decision of the court on said review, upon the filing of bond conditioned upon the due prosecution of said proceeding for review and that the petitioner will pay all court costs and abide by the order or determination of the agency in question if it is not set aside. Said bond shall be in such amount and with surety to the approval of the court but the penal sum shall not be less than five hundred dollars (\$500).

Where the determination of the agency is a revocation or suspension of a license and the law governing the agency permits a staying of the action of the agency by court order pending judicial review, any stay so ordered shall be effective during the period of review and any appeal therefrom and until finally determined, unless otherwise ordered by the court in which such review or appeal therefrom is pending. If the stay is granted as herein provided and the determination of the agency approved on final determination, the revocation or suspension of the license shall then immediately become effective.

4-22-1-18 Judicial review upon the record

Sec. 18. On such judicial review such court shall not try or determine said cause de novo, but the facts shall be considered and determined exclusively upon the record filed with said court pursuant to this act.

On such judicial review if the agency has complied with the procedural requirements of this act, and its finding, decision or determination is supported by substantial, reliable and probative evidence, such agency's finding, decision or determination shall not be set aside or disturbed.

If such court finds such finding, decision or determination of such agency is:

- (1) Arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law; or

(2) Contrary to constitutional right, power, privilege or immunity; or

(3) In excess of statutory jurisdiction, authority or limitations, or short of statutory right; or

(4) Without observance of procedure required by law; or

(5) Unsupported by substantial evidence, the court may order the decision or determination of the agency set aside. The court may remand the case to the agency for further proceedings and may compel agency action unlawfully withheld or unreasonably delayed.

Said court in affirming or setting aside the decision or determination of the agency shall enter its written findings of facts, which may be informal but which shall encompass the relevant facts shown by the record, and enter of record its written decision and order or judgment.

ATTACHMENT 5.

STATE OF INDIANA }
COUNTY OF ALLEN } ss:

IN THE MATTER OF COMMUNITY
HOSPITAL OF FORT WAYNE, INC.,
COMMUNITY HOSPITAL OF FORT
WAYNE, INC.,

Plaintiff,

vs.

INDIANA STATE BOARD OF HEALTH,
et al.,

Defendants.

In the Wells Circuit
Court.
Cause No. 25672.

ORDER

The Motion to Dissolve the Preliminary Injunction filed by the Defendant St. Joseph Hospital of Fort Wayne, Inc., is granted and the preliminary injunction heretofore entered is dissolved except that the Indiana State Board of Health (ISBH) shall take no action on the pending application of Lakeside Mercy Hospital, Inc., until such time as the proposals of the three Fort Wayne hospitals to provide substantially the same health care facilities have been acted upon by Indiana Region 3, Comprehensive Health Planning Council and transmitted to the ISBH so as to permit simultaneous consideration with the application of Lakeside Mercy Hospital, Inc.

/s/ JOSEPH E. EICHORN

Judge, Wells Circuit Court

Dated: May 27, 1975

STATE OF INDIANA } ss:
COUNTY OF ALLEN }

IN THE MATTER OF COMMUNITY
HOSPITAL OF FORT WAYNE, INC.,
COMMUNITY HOSPITAL OF FORT
WAYNE, INC.,

Plaintiff.

vs.

INDIANA STATE BOARD OF HEALTH,
et al.,

Defendants.

In the Wells Circuit
Court.
Cause No. 25672.

FINDINGS AND ORDER ON PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

Comes now the Court and makes the following Findings of Fact and Conclusions of Law on the Plaintiff's Motion for Partial Summary Judgment.

FINDINGS OF FACT

1. The Court hereby incorporates by reference and adopts as its own the Findings of Fact entered on September 19, 1974, by Richard W. Guthrie, Hearing Officer, as a result of the hearing held on August 6, 1974, under Cause No. L-7, which Findings of Fact are incorporated herein the same as if they were restated in their entirety.

2. The Findings of Fact and Conclusions of Law of the Hearing Examiner revise the Findings of the Indiana State Board of Health (ISBH) and constitute a final order or determination made by an agency entitled to Judicial Review under the provisions of the Administrative Adjudication and Court Review Act. (I. C. 4-22-1, *et seq.*)

3. This action, commenced on October 4, 1974, by the filing of a complaint by the Plaintiff entitled "Verified Petition for Judicial Review of Adverse Determination of Indiana State Board of Health", asks for a Court review of the administrative determination of ISBH, and asks, among other various prayers for relief, for review of the Administrative Order and Determination of ISBH made July 3, 1974, receipt of which was acknowledged by the Plaintiff on July 5, 1974.

4. The Court has no jurisdiction to review the determination of ISBH made on July 3, 1974, and received by the Plaintiff on July 5, 1974, in that:

(a) the order of determination by ISBH is not a final order or determination made by the ultimate authority of such agency as required by I. S. 4-22-1-11, as a prerequisite for Judicial Review;

(b) the Plaintiff has not filed a Verified Petition for a review of such order of determination within fifteen (15) days of the date of the receipt of the notice of such determination by the Plaintiff on July 5, 1974, as is required by I. C. 4-22-1-14 as a prerequisite for Judicial Review; and

(c) the Plaintiff has not filed a certified transcript of the proceedings before the ISBH within fifteen (15) days after the filing of such Verified Petition for Review as required by I. C. 4-22-1-14 as a prerequisite for such review.

5. This Court has no jurisdiction to review the order or determination of the Hearing Examiner made on September 15, 1974, made pursuant to the provisions of Regulation Section 100.105(c)(4) of the Regulations of the Secretary of the Department of Health, Education and Welfare, in that:

(a) the order of determination of the Hearing Examiner is not a final order of determination made by the ultimate authority of such agency in that said order or determination

constitutes only a recommendation to the Secretary of Health, Education and Welfare under 42 U. S. C. A.(a)-1 and does not constitute a final decision by the ultimate authority of such agency as required by I. C. 4-22-1-11 as a prerequisite for Judicial Review.

(b) the Plaintiff has not filed a Verified Petition for Review of such determination within fifteen (15) days after the date of the receipt of the notice of the determination of the Hearing Examiner and has not asked the Court to review the determination of the Hearing Examiner as is required by I. C. 4-22-1-14 as a prerequisite for such review.

(c) the Plaintiff has not requested a determination or review of the final decision of such Hearing Examiner.

6. The decision of the Hearing Examiner revises the Findings and Determinations of ISBH but it does not reverse the decision of ISBH and constitutes a determination subject to review under Regulations Sec. 100.104(c) *et seq.* of the Regulations of the Secretary of Health, Education and Welfare.

7. The Order, Decision and Determination made by the Hearing Examiner is not:

(a) arbitrary, capricious, or in abuse of discretion, or not otherwise in accordance with law, nor

(b) contrary to any constitutional right, power, privilege or immunity, nor

(c) in excess of statutory jurisdiction, authority or limitations, or short of statutory rights; nor

(d) without observation of procedure required by law, nor

(e) unsupported by substantial evidence.

CONCLUSIONS OF LAW.

Based on the foregoing Findings of Fact, the Court now makes the following Conclusions of Law:

1. The State Hill-Burton Plan was developed pursuant to the Public Health Service Act pursuant to the authority given to Defendants in IC 1971, 16-2-1 *et seq.*

2. The Defendants' interpretation of the State Hill-Burton Plan, as providing no new general hospital construction in the Fort Wayne area, is not arbitrary or capricious.

3. Pursuant to Section 1122(b) of the Social Security Act, the Defendants must find that the applicant's proposal is consistent with the State Hill-Burton Plan in order to recommend to the Secretary of the United States Department of Health, Education and Welfare that the applicant receive a capital expenditure reimbursement pursuant to the provisions of Section 1122.

4. The Application No. 2 of Plaintiff is not consistent with the State Hill-Burton Plan.

5. The Defendant must recommend pursuant to the provisions of Section 1122 that Plaintiff not receive a capital expenditure reimbursement under the Medicaid, Medicare and Maternal and Child Health programs.

6. The Defendants in creating and administering the Hill-Burton Plan pursuant to the provisions of Section 1122 are acting in their governmental capacity pursuant to IC 1971, 16-2-1, *et seq.*

7. The Defendants are not estopped to apply the requirements of the State Hill-Burton Plan to Application Number 2 of Plaintiff.

8. Pursuant to 42 C. F. R. 100.106(a)(4)(iii) the Defendants are required to consider the recommendations of the local agency (Region 3 Comprehensive Health Planning Council) before making their own recommendations.

9. Defendants' actions in not rendering an opinion on the propriety of Plaintiff's Application No. 2 until after the hearing by the local agency was consistent with the law.

10. In so doing Defendants did not violate the information and coordination requirements contained in the DPA manual at pages 6, 11 and 14.

11. There is substantial evidence in the record to support a finding that the Plaintiff has not demonstrated proof of a capability to provide comprehensive health care services efficiently, effectively and economically so that it should come within the exception described in 42 C. F. R. 100.104(b)(2).

/s/ JOSEPH E. EICHHORN

Judge, Wells Circuit Court

Dated: May 27, 1975